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N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: **BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION** **(MDL NO. 2406)**	**Master File No. 2:13-CV-20000-RDP** **This Document Relates to Provider Track Cases**

REPLY IN SUPPORT OF PROVIDER PLAINTIFFS' MOTION TO DISQUALIFY POLSINELLI, P.C. AND FOR CORRECTIVE NOTICE

The Polsinelli firm claims the right to advise clients to opt out of the settlement of litigation pending in Alabama. If a provider opts out, Blue Cross and Blue Shield of Alabama will lose the release it obtained through the settlement. If enough providers opt out, the entire settlement could be rescinded, not only eliminating the release but also causing further litigation against Blue Cross and Blue Shield of Alabama in federal court in Alabama. Polsinelli's reason? Its conduct, it says, has nothing to do with Alabama. Only by ignoring everything but the filing of litigation in other jurisdictions could Polsinelli make this incorrect claim. Moreover, one of its fundamental premises—that its client does no business with Blue Cross and Blue Shield of Alabama—contradicts this Court's holding that a Blue plan can do substantial business outside its service area by insuring members and paying for their care. Because Polsinelli lawyers have represented Blue Cross and Blue Shield of Alabama in this matter, basic principles of legal ethics prohibit the firm from advising clients to take action that would harm the interests of Blue Cross and Blue Shield of Alabama in this same matter.

Moreover, the presentation Polsinelli gave was misleading in important respects and flat-out false in others. Attorneys generally have the right to communicate with clients (barring a disqualifying conflict), but they do not have the right to mislead them. Provider Co-Lead Counsel's fiduciary duty to protect the class requires that they be allowed to send corrective notice.

ARGUMENT

I. POLSINELLI MAY NOT ETHICALLY ADVISE A PROVIDER TO OPT OUT.

When discussing its conduct, Polsinelli focuses exclusively on the filing of opt-out litigation, which it says would occur in jurisdictions outside Alabama, without Blue Cross and Blue Shield of Alabama (BCBS-AL) as a defendant. Polsinelli fails to acknowledge that the consequences of opting out go beyond the filing of new litigation. Opt-outs would cost BCBS-AL a release it bargained for and potentially jeopardize the entire settlement. Both consequences are plainly adverse to BCBS-AL. With the proper scope of Polsinelli's conduct in mind, the conflict of interest is clear, unavoidable, and disqualifying.

A. Alabama's Ethical Rules Apply Here.

Polsinelli invokes Rule 8.5(b) of the ABA Model Rules of Professional Conduct to assert that Alabama's ethical rules do not apply here. Rule 8.5(b) provides that the applicable rules are:

> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; …

Advising a client to opt out of the settlement, as opposed to the separate issue of advising a client to file an antitrust suit against the Blues, calls for the application of Alabama's rules. Opting out of a settlement preliminarily approved by this Court in Alabama, via a procedure ordered by this Court, is "conduct in connection with a matter pending before a tribunal" in Alabama. Attorneys who purport to advise clients on how to proceed in an Alabama matter are subject to Alabama's ethical rules.[1] *See Alzheimer's Inst. of Am., Inc. v. Avid Radiopharmaceuticals*, 2011 WL 6088625, at *3 (E.D. Pa. Dec. 7, 2011) (applying Pennsylvania's ethical rules to a California law firm); Michael P. Richman & Anthony Nguyen, Whose Rules Apply in Multi-Jurisdictional Cold-

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[1] It is unclear whether Polsinelli disputes that Dan Owen, whose presentation was the initial reason for this motion, is bound by the Alabama Rules of Professional Conduct in this matter. He clearly is, under LR 83.1.

Calling?, Am. Bankr. Inst. J., Dec./Jan. 2012, at 18, 68. ("What state's rules must be consulted in the first instance [when soliciting creditors in a bankruptcy proceeding]? In the case of an already pending proceeding, it seems clear that one must look at that state's (and the relevant tribunal's) rules.").

B. A Conflict Exists Because Opting Out Is Directly Adverse to BCBS-AL.

It is hard to imagine a conflict more disqualifying for a firm than advising one client to take action adverse to another client represented by the firm's attorneys *in the same matter*—even if the representation of the other client has ended. Ala. R. Prof. Conduct 1.9 ("A lawyer who has formerly represented a client in a matter *shall not* thereafter: (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" without consent) (emphasis added); ABA Model R. Prof. Conduct 1.9(a) ("A lawyer who has formerly represented a client in a matter *shall not* thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" without consent) (emphasis added). This Court has disqualified a large firm for less. *Southern Visions, LLP v. Red Diamond, Inc.*, 370 F. Supp. 3d 1314 (N.D. Ala. 2019) (disqualifying Bradley Arant from representing a party in a patent infringement suit against another party for whom the firm had handled unrelated matters).

Here, a provider who opts out of the settlement is directly adverse to BCBS-AL. The phrase "directly adverse" "does not always mean if one client wins the other automatically loses. It can also mean that if one client wins, the other one becomes weaker in some way, loses leverage or is in some way diminished." Doc. No. 3232-1 (opinion of the General Counsel of the Alabama State Bar) at 2. BCBS-AL, like all the Blues, bargained for a release when it settled this litigation. Whenever a provider opts out of the settlement, BCBS-AL loses the benefit of that release.

Although Polsinelli has pledged not to sue BCBS-AL directly on behalf of its clients, that does not stop another firm from suing BCBS-AL on behalf of the same clients. Thus, advising a provider to opt out of the settlement weakens or diminishes BCBS-AL. This is "materially adverse" to the interests of BCBS-AL under Alabama Rule 1.9. The adversity would become even worse if Polsinelli (and others) convinced enough providers to opt out that the settlement was rescinded. Then BCBS-AL would lose all the benefits of the settlement for which it bargained. By focusing solely on opt-out litigation, as opposed to opting out itself, Polsinelli ignores this adversity.

Even in focusing on opt-out litigation in other jurisdictions, Polsinelli makes a mistake that undermines its position. Six times, Polsinelli asserts that its client, which "operates in several states, … does not do business with BCBS Alabama." Doc. No. 3268 (Opposition) at 6; *id.* at 2, 7, 8, 10, 14. Presumably, Polsinelli means that its client does not have a *contract* with BCBS-AL, but that is not the same. Because of the wide reach of the BlueCard program, virtually all large providers treat BCBS-AL members, and are paid by BCBS-AL via their local Blue plan. The Court will recall that some of the Blues asserted that this Court lacked jurisdiction over them because they did not do business in Alabama. After extensive discovery and briefing, this Court disagreed, finding that all of these Blues do "substantial business" in Alabama, based on the premiums they collect from members who live in Alabama, the payments they make to Alabama providers, or both. *In re Blue Cross Blue Shield Antitrust Litig.*, 225 F. Supp. 3d 1269, 1296–99 (N.D. Ala. 2016). This would work the other way around; if BCBS-AL collects premiums from members in, say, Washington, and pays for their care there, under this Court's ruling BCBS-AL would be subject to jurisdiction there. Thus, even if Polsinelli chooses not to haul BCBS-AL into court in Washington, another firm might. Polsinelli's attempt to limit its own litigation options by

disavowing claims against BCBS-AL underscores the conflict that Polsinelli has placed both itself and its putative clients in.

Polsinelli also claims that the "Polsinelli lawyers who worked at the Maynard firm have not shared any confidential information with anybody else at Polsinelli[,]" and they have been screened. Opposition at 15. This is irrelevant. Polsinelli does not contest that Alabama does not permit a firm to avoid a conflict by screening lawyers. *See* Doc. No. 3245 (Motion to Disqualify) at 4–5. Neither does Missouri, where Polsinelli is headquartered and where Mr. Owen is based. *Id.* at 5. In addition, it is unclear from the filing whether such screening or other steps were taken before or after Mr. Owen's presentation and notice of the conflict was provided to Polsinelli.

C. Polsinelli's Arguments About Standing Are Moot Because BCBS-AL Seeks the Same Relief.

Polsinelli asserts that the Provider Plaintiffs have no standing to seek disqualification based on its alleged conflict with BCBS-AL. The Provider Plaintiffs' counsel have not just the right but the "absolute obligation to report violations of the *Alabama Rules of Professional Conduct*." Doc. No. 3232-1 at 3. In any event, BCBS-AL has diligently sought information from Polsinelli about this matter, objected to the conflict, and now has filed a joinder in this motion. Therefore, Polsinelli's argument that a lack of standing precludes disqualification is moot. Additionally, Polsinelli concedes it has other former clients who are Provider class members in this lawsuit, who presumably want to take advantage of the relief in the Settlement. Any attempt to "blow up" the Settlement is also against the interests of those former clients as well.

II. CORRECTIVE NOTICE IS WARRANTED.

It is not the Providers' intent to compel Mr. Owen to say anything with which he disagrees. Therefore, they are modifying their request for corrective notice such that the Providers would

send a Court-approved notice, with the assistance of the Settlement Notice Administrator. This modification should obviate any constitutional concerns.

The Providers agree with Polsinelli that "[c]lass members should be allowed to consult outside sources so they can make fully informed decisions about exercising their right to opt out." Opposition at 16. But that is not a license to mislead class members or make false statements; Alabama Rule 7.1 still prohibits false or misleading communications, including a communication that "[c]ontains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading[.]"[2] Mr. Owen made several such communications, which must be corrected.

Mr. Owen's Role in the Mediation and His Representations About Co-Lead Counsel's Motivations

Polsinelli points to a number of Mr. Owen's statements that he was giving his opinion or his view. But that is not what happened when he told his audience, "I was asked to be involved in settlement negotiations. So I know exactly what the goals of the case are." Doc. No. 3245-1 at 18. Seconds later, purporting to speak from personal knowledge based on his participation in the settlement negotiations, Mr. Owen said, "When it was clear that [certification of a nationwide class] wasn't going to happen, [Provider Co-Lead Counsel] simply gave up and made the best deal they could on a class-wide basis." *Id.* at 19. For a class member listening to this presentation, the only reasonable interpretation of these remarks is that Mr. Owen knows first-hand from his

[2] Mr. Owen states that he "did not view the informational presentation as a marketing opportunity for the firm," Opposition at 6, but Zotec's email promoting the presentation suggests otherwise, and also states that Polsinelli was already advising clients about the settlement: "Since 2016, the national law firm of Polsinelli, P.C. has been involved in this case for a wide range of healthcare providers and, most recently, advising providers as to whether they should accept the class action settlement or opt out. Polsinelli's presentation will cover the terms of the proposed settlement and the pros and cons of either accepting the settlement or opting out, as well as other options to seek direct damages against the applicable plans." Ex. 1. Mr. Owen also states that Zotec's clients are "typically smaller health care providers than Polsinelli would normally represent in an anti-trust action, Opposition at 6, but the copy of the invitation the Providers obtained was addressed to a large hospital system.

presence in settlement negotiations that Co-Lead Counsel threw in the towel. Mr. Owen did not disclose that he had not participated in mediation for five years before settlement. He had no basis for these statements, which were not couched as opinion.

The Effect of the Per Se Ruling

Polsinelli continues to be wrong about the effect of the *per se* ruling in this case. Damages are not "basically automatic." The single entity defense, which Mr. Owen did not disclose to his audience, remains to be decided, as does the trademark defense, which neither Mr. Owen nor Polsinelli acknowledge. And even if liability were established, issues of market definition and two-sided platforms would have to be overcome before a jury could award damages. *See US Airways, Inc. v. Sabre Holdings Corp.*, 2023 WL 2853931, at *1 (S.D.N.Y. Apr. 10, 2023) (noting a jury award of one dollar in nominal damages in an antitrust case that had been pending for twelve years). Making matters worse, Mr. Owen failed to disclose that claims for conduct after April 2021 (including claims for injunctive relief) will be governed by the rule of reason, not the *per se* rule. Telling class members that damages would be "basically automatic," and failing to disclose any of the defenses, specific risks, or the application of the rule of reason, falls squarely in the category of "a material misrepresentation of fact or law, or omit[ting] a fact necessary to make the statement considered as a whole not materially misleading."

The Court's Expectation of Opt-Outs

Mr. Owen told class members a story: "after it became clear that a lot of big subscribers' groups were opting out [of the Subscribers' settlement], there were new negotiations with The Blues and they came back to the judge with a new settlement agreement that was more acceptable." Doc. No. 3245-1 at 24–25. This is utterly, indefensibly false. In reality, confusion about certain class members' right to opt out of the settlement with respect to a specific category of relief caused

the Subscriber Plaintiffs to move to provide supplemental class notice. Doc. No. 2897. The parties did not change the settlement. Immediately after relaying his false story, Mr. Owen said, "When the judge was hearing this [at the Providers' preliminary approval hearing], he said from the bench, he alluded to the fact that this had happened before and basically indicated he wouldn't be surprised if it happened in this case." *Id.* at 25. Mr. Owen led his audience to believe, wrongly, that the threat of opt-outs caused substantial changes to the Subscribers' settlement (when the reality was that class notice was supplemented to account for an issue specific to the Subscribers), and that the Court expected the same (nonexistent) event would happen here. That is not an opinion; it is a false statement that must be corrected.

CONCLUSION

For the foregoing reasons, the motion should be granted.

Respectfully submitted this the 14th day of February, 2025.

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